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In The

Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO, ITS MAYOR, BOARD OF SUPERVISORS, and CITY ATTORNEY; THE CITY OF SANTA MONICA, ITS MAYOR, CITY COUNCIL, and CITY ATTORNEY,

Petitioners,

vs.

BANK OF AMERICA; WELLS FARGO BANK, N.A., CALIFORNIA FEDERAL BANK, and CALIFORNIA BANKERS ASSOCIATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Court of Appeals correctly held that ordinances barring automatic teller machine usage fees are preempted under regulations of the Office of Thrift Supervision ("OTS"), promulgated under the authority of the Home Owners' Loan Act of 1933, 12 U.S.C. §1461, where:

(a) OTS has expressly preempted and occupied the field of regulating federal savings association "operations," which are defined in regulations to include fees assessed for the transfer of funds by electronic means; and

(b) OTS has expressly preempted and occupied the field of service charges and fee assessments, including ATM fees; and

(c) Local ordinances regulating or barring ATM fee charges conflict with OTS' regulation of federal savings association fees and operations, and stand as an obstacle to the accomplishment of the federal regulation of associations.

RULE 29.6 DISCLOSURE

California Federal Bank has now merged into Citibank (West), FSB, which is ultimately a wholly owned subsidiary of Citigroup Inc., the only publicly traded corporation within the chain of ownership.

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REASONS TO DENY THE WRIT

Applying regulations of the Office of Thrift Supervision ("OTS") of the Department of the Treasury adopted under the authority of the Home Owners' Loan Act of 1933, 12 U.S.C. §1461, the Court of Appeals held that the assessment of fees or service charges for use of an automated teller machine by a non-account holder is one of the "operations" of a federal savings association. The Ninth Circuit found express field preemption of federal savings association "operations," based on yet another OTS regulation, *and* implied field preemption based upon the extensive federal regulation of association "operations." App. 14.

1. The Ninth Circuit's double-anchored decision presents no issue warranting the exercise of certiorari jurisdiction.[1]

A. "Federal regulations have no less pre-emptive effect than federal statutes." *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). OTS has "plenary and exclusive authority . . . to regulate all aspects of the operations of Federal savings associations. . . . " 12 C.F.R. §545.2. "Operations" include "funds transfer services" furnished "with or without fee," 12 C.F.R. §545.17, by electronic means or otherwise, 12 C.F.R. §555.200(a). This authority is "pre-emptive of any state law purporting to address the subject of the operations of a Federal savings association." 12 C.F.R. §545.2.

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[1] California Federal Bank adopts the statement of facts appearing in the Court of Appeals' opinion and the statement of the case appearing in the brief in opposition of the bank respondents.

The petition simply ignores the expressly preemptive OTS regulations relied upon by the Court of Appeals.

B. Petitioners attack the alternative holding of implied field preemption, claiming the Ninth Circuit overstated the breadth of federal regulation. Pet. 22-25. But the Court of Appeals relied on circuit precedent, summarily affirmed by this Court, when it described the regulation of federal savings associations as so "pervasive as to leave no room for state regulatory control." App. 14, quoting *Conference of Federal Sav. & Loan Ass'ns v. Stein*, 604 F.2d 1256, 1260 (9th Cir. 1979), *aff'd*, 445 U.S. 921 (1980).[2]

Even at that, the Court of Appeals recognized this rule of field preemption is discerning: federal regulation may not have a fully-displacing effect on state contract, commercial, tort, criminal, or real property law. App. 11, n.3.[3] But the Ninth Circuit necessarily classified the cities' rate-regulating ordinances as akin to "regulatory control over the lending institutions to insure that the substantive rights of [customers] are respected," *Stein*, 604 F.2d at 1256, thereby planting the ordinances firmly within

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[2] *Stein* was also discussed with approval in *de la Cuesta*, 458 U.S. at 160.

[3] The Ninth Circuit relied on Justice O'Connor's concurring opinion in *de la Cuesta*, 458 U.S. at 172, as well as OTS regulations, 12 C.F.R. §§557.13(a) & §560.21(c), dispelling petitioners' suggestion of conflict with the concurring opinion. Pet. 24. The dissenting justices did not think Congress authorized the regulation the Court found preemptive in *de la Cuesta*, 458 U.S. at 172 (Rehnquist, J., dissenting). That viewpoint is not in conflict with the Ninth Circuit's holding here.

traditionally preempted territory.[4] These ordinances unquestionably regulate the fees a federal association may charge for the services it provides as a depository and lending institution. App. 60 [§648.1(b)], 65-66 [§4.32.040(b)]. As the OTS noted in its Ninth Circuit *amicus curiae* brief, "the ATM fees targeted by the Ordinances bear directly on the deposit- and lending-related operations of [federally chartered savings associations]." OTS Amicus Brief, Case No. 00-16355, U.S. Ct. Appeals, Ninth Circuit, 12/19/00, at p. 16 ("OTS Am.Br.").

There is no direct *or* indirect conflict in the precedents. Rather, petitioners sponsor a flawed syllogism, which proceeds this way: the Ninth Circuit said regulation of federal savings associations broadly forecloses state or local regulation; some courts hold such federal regulation is not complete enough to preempt on the facts of particular cases arising before those courts; therefore – and ignoring altogether material differences between this case and the others they cite – the cities assert conflict in the case law. Pet. 23-24.

Thus, *Flanagan v. Germania*, 872 F.2d 231 (8th Cir. 1989), held that the federal government had not occupied the field to such an extent as to preempt Missouri's generally applicable tort cause of action for interference with contract as applied to allegations of association misconduct while collecting a particular loan. *Federal Deposit*

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[4] *Stein* distinguished state laws regulating the lending practices of federal savings associations to assure non-discrimination (subject to field preemption) from consumer lawsuits asserting violation of state anti-discrimination laws based on untoward lending practices (presenting a different preemption inquiry the court did not need to address).

Ins. Corp. v. Stahl, 89 F.2d 1510, 1515 (11th Cir. 1996), approved the application of state negligence law to the conduct of association directors based on specific, state law saving language found in 12 U.S.C. §1821(k), an altogether different statute from what is at issue here.[5]

Finally, petitioners assert conflict with the OTS Electronic Operations Rules, 63 Fed.Reg. 65673 (Nov. 30, 1998). According to petitioners, these envision case-by-case consideration of preemption. Pet. 24.

This rather pointless and incomplete contention misses the mark. "[T]he [Electronic Operations Rule, 12 C.F.R. §555.200,] will have preemptive effect [on state laws affecting ATM operations] where appropriate to: (1) facilitate the safe and sound operations of a Federal savings [bank], (2) enable a Federal savings [bank] to operate according to the best thrift institution practices in the United States, and (3) further other purposes of the [Home Owners' Loan Act of 1933] HOLA."). 63 Fed. Reg. 65673 at 65681, citing 12 C.F.R. §545.2 (operations), §§557.11-557.13 (deposits), and §560.2 (lending and investment). As OTS explained in its Ninth Circuit *amicus curiae* brief, responding to the very same argument by the cities:

> After articulating the general statement on preemption principles upon which San Francisco relies, the very next paragraph of the preamble

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[5] *Resolution Trust Corp. v. Gregor*, 872 F.Supp. 1140 (E.D.N.Y. 1994), also involves the application of state law to the liability of the directors of an association.

> explains that when OTS reviews state laws concerning electronic operations, it will focus on the underlying activity affected by the state law. And, referring *specifically* to deposit-related and lending-related activities, OTS explained "[f]or example, if a state law affects a Federal savings association's ability to take deposits or lend using electronic means and facilities, OTS will apply the part 557 or part 560 preemption analysis for deposit or lending activities, respectively.

OTS, Am.Br., pp. 9-10 (emphasis in original).

Turning to these regulations, OTS has expressly stated its intent to preempt state laws governing service charges and fees. 12 C.F.R. §557.12(f) ("OTS preempts state laws that purport to impose requirements governing . . . [s]ervice charges and fees . . . "); 12 C.F.R. §560.2(b) ("the types of state laws preempted by paragraph (a) of this section include, without limitation, state laws purporting to impose requirements regarding . . . [l]oan-related fees, including without limitation, initial charges, late charges, prepayment penalties, servicing fees, and overlimit fees").

And turning next to ATM fees, the Chief Counsel of OTS concluded, in two separate letters, that the Santa Monica and San Francisco ordinances, respectively, do not apply to federal savings associations based on federal preemption.[6]

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[6] The letters are in the record as Exhibits D & E to the Roger declaration, filed April 10, 2000. The letter concerning the Santa Monica ordinance is dated November 22, 1999; the San Francisco letter

(Continued on following page)

2. Although it is unnecessary to venture further, the judgment in this case rests on other grounds that are established as a matter of law.[7]

A. The district court held that HOLA and allied OTS regulations "occupy the field of ATM fee regulation," App. 32, resulting in preemption of the cities' ordinances. This result rests not only on the express wording of OTS regulations, but also on field occupation:

> OTS has made clear its intention to occupy the field of regulation of a federal savings association's deposit-related and loan-related activities, including those conducted through electronic means. OTS has not banned or restricted ATM access fees. To the contrary, as noted above, to the extent a federal savings association performs deposit-related functions through ATMs, these functions are governed by OTS's regulations on deposits, which specifically occupy the field and preempt any state law restrictions on service charges and fees. To the extent a federal savings association performs loan-related functions through ATMs, these functions are governed by OTS's regulations on lending, which also specifically occupy the field and preempt any state law restrictions on loan-related charges and fees, including service charges.

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is dated December 7, 1999 and relies on the analysis in the earlier Santa Monica letter.

[7] The Court of Appeals acknowledged the existence of alternative grounds, but found it unnecessary to address them, given its decision on "operations." App. 15.

OTS Chief Counsel letter of November 22, 1999, to First Federal Bank of California, pp. 10-11 (footnotes omitted, citing 12 C.F.R. §557.12(f) and 12 C.F.R. §560.2(b)(5) [each quoted in pertinent part, *ante*]). OTS made the same point as *amicus curiae* in the Court of Appeals. OTS Am.Br. 25.

B. The judgment is also proper under conflict preemption principles, as OTS has maintained:

> federal regulations not only do not bar the Association from charging ATM access fees, the regulations specifically preempt state restrictions on the Association's authority to charge deposit-related and loan-related service charges and fees. The Ordinance, by contrast, bans such charges completely as to nonclients of the Association and other financial institutions. Because the Ordinance restricts what federal regulations allow, the Ordinance is an obstacle to the accomplishments of the full purposes and objectives of OTS's regulations. The Ordinance conflicts with OTS regulations and thus is preempted by federal law.

OTS Chief Counsel letter of November 22, 1999, at pp. 12-13; *see also* OTS Am.Br. 25-27.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: April 24, 2003

Respectfully submitted,

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